In the Supreme Court of the United States

OCTOBER TERM 1944.

No. 342.

In the Matter of
THE HIGBEE COMPANY, *Debtor* } BANKRUPTCY No. 36,119.

ROBERT R. YOUNG,
Petitioner,

vs.

THE HIGBEE COMPANY,
WILLIAM W. BOAG and
J. F. POTTS,
Respondents.

BRIEF OF RESPONDENTS

On Petition for Writ of Certiorari
To the United States Circuit Court of Appeals
For the Sixth Circuit.

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STATEMENT OF ISSUE.

No principle of law about which there is the slightest dispute is raised by the petition. Petitioner seeks to have this Court reverse the findings of the lower Courts in order that Potts, alone, be required either to account to The Higbee Company for the difference between the market value of the stock at the time of the sale, sold to Bradley and Murphy and the sum received therefor, or to require Potts to pay to the preferred stockholders a similar sum of money. As stated in the order of the Circuit Court of Appeals (R. 264), this relief is sought on the theory:

> "that (a) Potts and Boag in the prosecution of their appeal to this Court were acting for themselves and all preferred stockholders, or (b) that Potts and Boag

in the prosecution of their appeal were asserting a derivative right belonging to the debtor; * * *."

FACTS.*

Were it not for the charge in the petition (p. 3) that respondents acted in bad faith and with flagrant misconduct (p. 21) the facts essential to the determination of the single issue presented could be stated very briefly. However, lest the failure of the respondents to defend themselves against the unfair charges contained in the petition give rise to the inference that the charges of reprehensible conduct are true, certain of the findings of the courts below must be presented in this Brief.

In June of 1937, Charles L. Bradley and John P. Murphy acquired from the Ball Foundation (hereinafter referred to as Ball) the Higbee securities, and paid therefor the sum of $600,000, $60,000 of which was paid in cash and the balance by the purchasers' note for $540,000 secured by the pledge of the Higbee securities. (Finding 2, R. 240.) The purchasers' note provided that, in the event of sale of the collateral, the holder of the note was under no obligation to account to the makers for any over-plus in case the sale should produce more than the amount of the indebtedness. (Finding 7, R. 241.)

A Plan of Reorganization for The Higbee Company was filed in 1940, which provided that the securities which Bradley and Murphy had purchased would finally represent a majority of the common stock of The Higbee Company. (Finding 8, R. 241.) The respondents, prior to that time, had been members of a preferred stockholders committee but they resigned from the committee, after the plan had been filed, because they disagreed with the other members of the committee over the treatment of the securities which Bradley and Murphy had purchased although

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*See the Precise Issue of Fact p. 6 *infra*.

the Plan of Reorganization, in this respect, was agreeable to all members of the Committee except respondents. (Finding 9, R. 241.)

Thereafter the respondents tried to form a new committee to oppose the plan but were unsuccessful in their effort and no one joined with or authorized respondents to act for them. (Finding 10, R. 241.) Petitioner's lawyer admitted that Potts informed him of this. (R. 47, 232.) Respondents requested petitioner to join with them but he refused. (Finding 13, R. 242.) Thenceforth the respondents, solely upon their own behalf "and not as representing other interests or rights," prosecuted their objections and exceptions to the plan. (Finding 11, R. 241.)

In May of 1941, shortly after the Circuit Court of Appeals of the Sixth Circuit (*In re Van Sweringen Corporation*, 119 F. (2d) 231) held that petitioner's company (Midamerica) never had anything more than a nominal interest in The Higbee Company's landlord, The Cleveland Terminals Building Company, petitioner and his associate, one Kirby, brought suit against Bradley and Murphy, asking that petitioner and Kirby be declared to be the equitable owners of the Higbee securities. (Finding 14, R. 242.)

At about the time this suit was brought, petitioner told respondents that he was not interested in respondents' opposition to the Plan of Reorganization because it was to petitioner's interest "to have Bradley and Murphy get all they could for said securities under the Amended Plan of Reorganization so that there would be that much more for Young (petitioner) to try to take away from them." (Finding 15, R. 242.)

The avails of the securities acquired by Bradley and Murphy, under the Plan of Reorganization, were ample for financing the payment by Bradley and Murphy of their $540,000 note, (Finding 20, R. 243) but the appeal taken by respondents prevented the confirmation of the Plan. (Finding 21, R. 243.) Petitioner knew this. (Finding 22, R. 243.)

Petitioner and said Kirby on March 2, 1942 acquired from Ball the Bradley and Murphy note, including the collateral pledged therewith, which consisted of the Higbee securities. (Finding 5, R. 240.) On the very next day, petitioner and Kirby declared the note due, and served notice of their intention to sell the collateral and to bid at the sale. (Finding 6, R. 240.)

It is important at this point to bear in mind that, under the peculiar provisions of the note relieving the holder from any duty to account to the makers for any overplus which the sale might produce, the holder of the note was in a position to bid in collateral without any competition from other bidders. (Finding 7, R. 241.)

Bradley and Murphy then, being faced with the practical certainty of losing their investment to petitioner, unless they were able to pay their note, began negotiating for the purchase of respondents' holdings, so that the appeal then pending in the Circuit Court of Appeals could be dismissed and the Plan thereby confirmed. (Finding 24, R. 243.) Petitioner's counsel tried to induce respondents not to sell to Bradley and Murphy, and in fact stated that petitioner would meet any offer which Bradley and Murphy should make. (Finding 26, R. 244.) Thereafter respondents sold their holdings to Bradley and Murphy for $115,000 (Finding 28, R. 244), and a stipulation was filed in the Circuit Court of Appeals by Bradley and Murphy, as successors to the rights of respondents, seeking to dismiss the appeal. (Finding 31, R. 244.)

Petitioner thereupon sought to intervene in the Circuit Court of Appeals so as to object to the dismissal (Finding 31, R. 245) upon the ground that respondents were, in the prosecution of their appeal, acting in a representative capacity on behalf of all preferred stockholders. (Finding 33, R. 245.)

At this point the Securities and Exchange Commission notified the Circuit Court of Appeals that it consid-

ered the Plan of Reorganization fair and reasonable and that it had no objection to the dismissal. (Finding 34, R. 245.)

After a full hearing, at which counsel for petitioner was present and participated, the Circuit Court of Appeals dismissed the appeal. (Finding 36, R. 245.) The Plan having thus been confirmed, Bradley and Murphy were able to borrow sufficient funds to pay their note which petitioner had procured on May 2, 1942. (Finding 41, R. 246.)

Petitioner, having thus been thwarted in his scheme to capture from Bradley and Murphy the Higbee securities by purchasing them, without competition, at forced sale has ever since that time pursued the respondents.

The studied lack of candor employed by petitioner in his presentation is persuasively demonstrated by the language omitted in the quotation on page 16 of petitioner's brief, where the statement of Mr. Sherwood of the Securities and Exchange Commission is only partially printed. The omitted part, shown only by the use of three asterisks, is (R. 193):

> "Mr. Young (the petitioner) made application to intervene in the proceedings and the Court refused to grant it. Mr. Young's purpose, obviously, in wanting to intervene, was to continue with the appeal and even if the appeal was a representative or class appeal, the Court, in its discretion, could dismiss it and it might very well appear to the Court that the motives of Mr. Young, who had, through counsel, expressed his approval of the Plan, and the appeal was, of course, from the confirmation of that Plan, the circumstances under which he then wished to intervene were not such as to induce the Court to grant the application."

Not only did the Court of Appeals of the same Circuit pass upon the question adversely to petitioner both times it was presented, but a majority of the Judges sitting on the two occasions were the same persons.

As stated in the opinion of the District Court, in restrained language:

> "Based upon a knowledge of the history of these proceedings, it must frankly be said that this matter arises out of a personal controversy between the exceptor Young, and Bradley and Murphy, growing out of earlier relationships and over control of The Higbee Company." (R. 252.)

THE PRECISE ISSUE OF FACT.

The only findings of fact made by the Master, all of which were adopted by the two courts below, and which are essential to the single question raised by the petition, are:

(Finding 9, R. 241):

> "Prior to the filing of said Amended Plan of Reorganization, J. F. Potts and William W. Boag had been members of the New Preferred Stockholders Committee, but they resigned at that time as members of such Committee because they disagreed with the other members of the Committee respecting the treatment of the junior indebtedness, which treatment as set forth in the Amended Plan of Reorganization was agreeable to all members of the Committee except Potts and Boag."

(Finding 10, R. 241):

> "Upon their resignation as members of said Committee, Potts and Boag solicited the support of other preferred stockholders to join them in opposing the provisions of the Amended Plan of Reorganization relating to the treatment of the junior indebtedness; which solicitation was unsuccessful and no one joined with or authorized Potts and Boag to act for them."

(Finding 11, R. 241):

> "Thereafter, and on December 18, 1940, and thenceforth until the dismissal of their appeal by the Circuit Court of Appeals on March 11, 1942, Potts and Boag, solely in their individual capacities and not as representing other interests or rights, prosecuted their ob-

jections and exceptions to the confirmation of the Amended Plan of Reorganization."

(Finding 37, R. 246):

"The evidence offered fails to show that Potts and Boag represented any other stockholders than themselves and in the filing of objections to the confirmation of the Amended Plan of Reorganization and in the prosecution of their appeal from the order of the United States District Court confirming the Amended Plan of Reorganization, said Potts and Boag acted only for themselves individually and not as the representatives of a class and their appearance in these proceedings was at no time derivative in its nature or effect."

ARGUMENT.

Since the only theory upon which petitioner seeks relief is that Potts and Boag were acting either in a representative capacity or that they were asserting a derivative right, the theory falls of its own weight in the light of the findings of fact that Potts and Boag were acting solely for themselves. That they had the right to act solely for themselves is perfectly clear from the express provisions of Chapter 10 of the Bankruptcy Act, which provide:

Section 206:

"The debtor, the indenture trustee, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a proceeding under this chapter. * * *"

Section 209:

"Any creditor or stockholder may, in a proceeding under this chapter, act in person, by an attorney at law, or by a duly authorized agent or committee."

The record fails to disclose that Potts and Boag either intervened or attempted to intervene as a stockholders committee. Accordingly, the authority upon which petitioner relies, sound as it may be, has no application to the factual situation as found by the tribunals below.

CONCLUSION.

The petition constitutes nothing more nor less than an effort to re-argue the evidence presented to the Special Master, as petitioner has argued it before the Special Master, before the District Court and before the Circuit Court of Appeals, in all of which the facts were determined against him. No conflict of decision between the Circuit Courts of Appeals of different circuits is involved. Nor is any question of law, of importance to the public, presented about which there is a substantial doubt. The petitioner seeks only to re-argue the evidence, after both courts below decided all questions of fact against him. *Texas & New Orleans R. R. Co. et al. v. Brotherhood of Ry. and Steamship Clerks, et al.*, 281 U. S. 548.

It is therefore respectfully submitted that the Petition for Writ of Certiorari should be denied.

J. Fred Potts,

Paul S. Knight,

Attorneys for Respondents.